

# **WIIN Act Implementation Frequently Asked Questions**

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## **WIIN Act Implementation Frequently Asked Questions**

### **Application Process for Seeking EPA Approval of a State CCR Permit Program (Guidance and Delegation Questions)**

- 1. Will there be an approval process and/or “application” process by States to receive approval of their CCR permit program or other system of prior approval and conditions (hereafter called permit program) by EPA?**

Yes, there will be an approval process for state permit programs. The WIIN Act does not require EPA to promulgate a rule. Thus, at this time, EPA is developing a guidance document in order to assist States in ensuring that their permit program applications are complete and adequate by providing a framework for the approval process. The guidance will address required components of the state permit program application, demonstration of adequacy including legal and procedural requirements, allowable state flexibilities and a checklist to ensure compliance with the requirement to be as protective as the federal part 257 regulations.

- 2. Will the approval process be done at the EPA Regional level or at the HQ level?**

At this time, we are proposing to delegate the authority to approve state permit programs to the Regional Administrators with concurrence from OLEM and OGC.

- 3. Will a proposal for a CCR program require an Attorney General statement or can existing regulations (provided they are adequate) be proof that the State has the power to regulate CCRs?**

We are proposing to require a state to submit a written certification from the state Attorney General that the laws, regulations, and any applicable guidance cited in the application are enacted at the time the certification is signed and are fully effective when the state permit program is approved. This certification may be signed by the independent legal counsel for the state rather than the Attorney General, provided that such counsel has full authority to independently represent the lead state agency in court on all matters pertaining to the state program.

- 4. Will States have the opportunity to review what EPA proposes to include in a State CCR permit program approval package and provide input to EPA before finalization?**

Yes. We are currently working on the details of a process to obtain input from all stakeholders.

- 5. Will EPA need to publish an implementation rulemaking or be able to address implementation through guidance?**

The statute does not require EPA to promulgate a rule in order to implement the its provisions. At this time, therefore, we are planning to address implementation through guidance.

- 6. When will States need to submit “to the Administrator...evidence of a permit program or other system of prior approval and conditions under State law for regulation by the State of coal combustion residuals units that are located in the State that after approval by the Administrator, will operate in lieu of regulation of coal combustion residuals units in the State...?”**

The statute does not establish any deadline by which a State needs to submit their permit program.

- 7. Do States need to let EPA know sometime soon of their intent to submit such evidence?**

As noted above, there is no deadline by which a State needs either to inform EPA of its intent to submit a program for EPA approval or to actually submit that program. However, if a state does wish to develop and submit for approval a CCR permit program, EPA encourages them to reach out to their Regional CCR contact or to ORCR HQ, so that we can work together informally before the official submittal occurs.

#### **Criteria for EPA Approval of a State CCR Permit Program**

- 1. If a state submitted a permit program now, would the 180-day clock start for EPA to approve program even though no guidance, etc. has been issued on permit programs?**

The 180-day clock for EPA to evaluate a state program would begin once the State had submitted sufficient evidence to allow EPA to determine whether the standard in 4005(d)(1) has been met. This could occur even though EPA had not yet issued guidance on the “form...and evidence” necessary to make that determination. However, if EPA determined that a State’s initial submission was insufficient, the 180-day review period would not commence until the submission was evaluated as complete or sufficient.

In other program approval situations, EPA has 30 days to make a determination that a submission is complete. EPA does anticipate taking some time up front to make such a “completeness” determination. EPA would inform the State of the results of that determination as soon as possible. Where EPA and the State have been working closely on the submission as it is being developed, EPA believes that the “completeness” determination should be relatively pro-forma.

- 2. What criteria will a State have to meet to get an EPA approved CCR permit program?**

The statute directs EPA to approve any State program that requires each coal combustion residuals unit located in the State to achieve compliance with either: (1) the Federal CCR requirements at 40 CFR 257; or (2) other State criteria that the Administrator, after consultation with the State, determines to be *at least as protective as* the Federal requirements. Section 4005(d)(1)(B).

EPA is proposing to use existing regulations, including the provisions in part 239 and part 258 as potentially useful sources of guidance. The elements of the program will likely be similar to those outlined in part 239 and the technical criteria will need to ensure that the regulations are as protective as the federal CCR part 257 regulations.

**3. If a State adopts the EPA CCR rule by reference, would EPA view that State as having an approved permit program?**

If a State adopted the CCR rule by reference, and implemented it through an existing permit program, the State program would meet the statutory standard for approval (see 4005(d)(1)(B)(i)), but under the process laid out in the statute, the state would still need to submit an application for a permit program in order to obtain approval for a permit program. Also, if a state adopts the CCR rule by reference, their permits would have to align with the state regulations (e.g., no flexibilities from CCR federal rule).

**4. Will EPA approve a state permit program that allows flexibilities that EPA didn't specifically allow in the CCR rule (b/c of lack of state permit program)?**

Yes, provided we determine it is at least as protective as the federal program

**5. Where the legislation says permit program or "other system of prior approval and conditions," what does that mean?**

This language is the same as the provision in 4005(c) for Municipal Solid Waste Landfills, which authorizes states to adopt either a permit program or some other system to regulate their units. To our knowledge, no state has ever come up with an "other system of prior approval and conditions".

**6. What will constitute adequate "evidence of a permit program or other system?"**

EPA is proposing to develop guidance based on existing regulations, including the provisions in parts 239, 256, and 258 which have been used in the past for approval of State programs.

- a. **Will EPA require evidence that the State permitting program is at least as stringent as RCRA D requirements even though State programs are not "authorized" in the same way as RCRA C programs?**

Yes, the statute requires evidence that the State program will require each coal combustion residuals unit located in the State to achieve compliance with either: (1) the Federal CCR requirements at 40 CFR 257; or (2) other State criteria that the Administrator, after consultation with the State, determines to be at least as protective as the Federal requirements. Section 4005(d)(1)(B).

**b. Will the State's submission have to be compared to the federal requirements and pass a test of stringency line-by-line?**

The State's submission will be compared to the federal CCR part 257 requirements and must be at least as protective as those. EPA has not yet determined whether a line-by-line stringency test is necessary.

**7. Will EPA require CCR to be a solid waste under the State program as one of the criteria for approval of a State program, or will it be acceptable to develop a CCR permit program meeting the RCRA Subtitle D Part 257 requirements even though CCR is not designated a solid waste in the State?**

Section 4005(d)(1) provides that a permit program can be approved as long as EPA can determine that the State program will require each CCR unit located in the State to achieve compliance with either: (1) the Federal CCR requirements; or (2) other State criteria that the Administrator, after consultation with the State, determines to be "at least as protective as" the 257 regulations. The statute doesn't require that the state permit program be a "waste" permit program.

**8. If a State met all the approval criteria but prohibited by rule any permitting of a new or expansion of an existing CCR impoundment (therefore, there would not be any State permit rules for such types of CCR disposal facilities), would EPA consider that a "whole" or "partial" State CCR permit program approval**

If the intent of the state program is to prohibit new CCR surface impoundments and expansions of existing CCR surface impoundments, EPA would likely consider that to be a "whole" State program (albeit one that is more stringent than the Federal program). If the intent is to allow such activities but to have them remain subject to the Federal requirements, EPA would likely consider that to be a "partial" State program.

**9. If a State has existing permit rules dealing with permitting processing and procedures and relies on permit review guidance and best professional judgement in the technical review of a permit application, would EPA consider some form of a conditional State CCR permit program approval?**

EPA would need to evaluate the State program on its merits, based on the evidence the State submits. However, it seems unlikely that the State could demonstrate that such a program would meet the statutory requirement "that the [State] program or other

system **requires each coal combustion residuals unit located in the State to achieve compliance with** the Federal or State requirements.” Section 4005(d)(1)(B)(emphasis added).

## **Partial Approval of a State CCR Permit Program**

### **1. What does “partial approval” mean?**

If a state submits a permit program for approval that only covers some types of units (e.g., landfills) or doesn’t cover all elements of the CCR regulations (i.e., doesn’t cover structural stability), EPA could grant a “partial approval” that would only cover those elements in the state’s permit program. All units or operations that are not covered by the approved State program would remain subject to the part 257 regulations.

### **2. If a State has existing rules and issues permits for only certain types of CCR facilities (such as CCR landfills but not CCR impoundments) that the State believes meet the federal CCR permit program approval criteria, would EPA consider this reason to provide a partial approval?**

Yes.

### **3. Would there be any expectation by EPA that a State given a partial CCR permit program approval is obligated to later seek “whole” program approval?**

No. The statute expressly authorizes EPA to approve a program “in whole or in part.”

### **4. Would EPA condition a “partial” CCR permit program approval to establish an obligation to later seek “whole” program approval?**

No. The statute expressly authorizes EPA to approve a program “in whole or in part.”

### **5. Would EPA intend to conduct a future review and then “withdraw” that partial approval because the State had not submitted for a “whole” program approval?**

No. The statute expressly authorizes EPA to approve a program “in whole or in part.”

## **Non-Participating States**

### **1. What happens if a State does not seek approval of its CCR permit program?**

In that case, the state will be a non-participating state, and facilities will either remain subject to the CCR rule, or subject to an EPA permit program (if Congress provides specific appropriations).

The definition of a nonparticipating state is

"a State—

*“(i) for which the Administrator has not approved a State permit program or other system of prior approval and conditions under paragraph (1)(B);*

*“(ii) the Governor of which has not submitted to the Administrator for approval evidence to operate a State permit program or other system of prior approval and conditions under paragraph (1)(A);*

*“(iii) the Governor of which provides notice to the Administrator that, not fewer than 90 days after the date on which the Governor provides the notice to the Administrator, the State will relinquish an approval under paragraph (1)(B) to operator a permit program or other system of prior approval and conditions; or*

*“(iv) for which the Administrator has withdrawn approval for a permit program or other system of prior approval and conditions under paragraph (1)(E).*

**2. What does EPA plan to do about permit program implementation in non-participating States?**

It will depend on when (and whether) Congress provides specific appropriations. EPA cannot implement a permit program in nonparticipating States without a specific appropriation to do so. In the case of a nonparticipating State and subject to the availability of appropriations specifically provided in an appropriations Act to carry out a program in a nonparticipating State, the Administrator shall implement a permit program for CCR facilities.

**3. When will EPA begin implementing its own permit program in nonparticipating States?**

It will depend on when (and whether) Congress provides specific appropriations. EPA cannot implement a permit program in nonparticipating States without a specific appropriation to do so.

**4. Does the self-implementing EPA rule remain in effect until EPA establishes and issues a federal CCR permit?**

Yes, the statute expressly provides that a facility must continue to comply with the part 257 federal CCR regulations until a permit issued by an approved state or EPA is in effect. Section 4005(d)(3).

**Transitional Issues Prior to Implementation of an Approved State, or EPA, CCR Permit Program**

- 1. Does the self-implementing EPA rule remain in effect until a State permit program is approved?**

Yes, the statute expressly provides that a facility must continue to comply with the part 257 federal CCR regulations until a permit issued by an approved state or EPA is in effect. Section 4005(d)(3).

- 2. What are the potential ramifications for existing State CCR permit programs, meaning, what happens to State permits already issued when the new federally approved permit program comes into place?**

If a state remains a “non-participating” state (that is, one without an approved CCR permit program) then the federal CCR regulations will continue to apply to those facilities even though they may have state permits.

If the state becomes a state with an approved CCR permit program, the existing permits will most likely need to be reviewed to ensure that they comply with the requirements of the approved program. If the permits do not, it is likely that they would need to be revised and reissued.

- 3. Is it assumed that facility operators will need to comply with federal rules until a State program has been approved by EPA, even though there will be no EPA program to "certify" compliance. After a State permitting program is approved by EPA (this may take a few years), time will be needed to implement the State program, including operators preparing permit applications, State permit reviews, public notice and comment, etc. Will EPA consider approving a State permit program that provides operators time (a few years at most) to obtain permits under the new State program? In the case of one State, the State would probably require continued compliance with our existing regulations until operators receive permits under new rules.**

The statute expressly provides that a facility must continue to comply with the part 257 federal CCR regulations until a permit issued by an approved state or EPA is in effect. Section 4005(d)(3). No matter how long it takes to get a permit in place and approved, the facility must be in compliance with the federal rule until such permit is issued.

- 4. Once a State CCR permit program gets EPA approval, would EPA expect that facilities in the State continue to comply with the self-implementing EPA rule until the facility is issued a new State permit under the approved State program?**

Yes. The statute expressly provides that a facility must continue to comply with the part 257 federal CCR regulations until a permit issued by an approved state or EPA is in effect. Section 4005(d)(3).



5. **Could a state receive permitting program approval for SIs if they are regulated under their wastewater program and not as waste management units (regulations would be as stringent as 257, but the units wouldn't be labeled waste management units and multiple construction and operation permits would be issued to cover various aspects of the rule). For example, a construction permit would be issued that would cover design and location aspects of the rule and an operational permit would be issued to cover monitoring, structural stability, etc., and another construction permit would be issued to cover closure and another operational permit to cover post closure care requirements.**

Section 4004(d)(1) provides that a permit program can be approved as long as it is "as protective as" the part 257 CCR regulations. It doesn't specify that the state permit program needs to be a "waste" permit program.

6. **For a state where certain elements of the CCR part 257 criteria (e.g., structural stability) fall under a different state agency than the rest of the criteria, could that state seek a partial approval for only a portion of the surface impoundment requirements (e.g., not the structural stability portion)? Is this something that can be considered under the partial program approval provision?**

Yes, this could be considered a "partial approval." Any approval would need to be clear what was covered and what wasn't, as any activity or aspect that was not part of the approved State program would remain subject to the CCR rules.

7. **If a state did not submit their CCR regulations under the SWMP approval process prior to the WIIN legislation, can the state now submit their state regulations for EPA approval to that their state regulations could operate in lieu of the EPA regulations under the new federal legislation?**

The state would need to submit more than their state regulations, they would need to submit a CCR permitting program for review and approval from EPA. In order to be approved the State permit program must be "as protective as" the federal CCR criteria in part 257.

8. **If a state did develop CCR regulations as part of the SWMP approval process, what does the state have to do now? Does this new legislation create a different mechanism?**

Under the SWMP approval process, a state with an approved SWMP (and regulations) still could not operate "in lieu of" the federal part 257 regulations. That state could now submit their permitting program (and regulations) to EPA for program review and approval. If approved, permits issued under the state program would operate in lieu of the federal regulations.

## **Future EPA Review of an Approved State CCR Permit Program**

- 1. In the provision regarding EPA review of a State permit program, what does “significant” mean in terms of a release?**

EPA’s main priority at this time is to develop the procedures for state programs to be approved and the elements that a state permit program would have to contain. We have not as yet focused on the provisions for review of a State permit program.

- 2. In conjunction with initial State program approval, EPA should specify now what information it will need to see in order to review State programs in the future. What recordkeeping/ documentation will States need to maintain in order to demonstrate to EPA that they are properly implementing their approved programs/rules?**

EPA has made no decision yet about the criteria (including the evidence that a State will need to submit) it will use to evaluate or review State programs. As noted above our priority is to develop procedures for state programs to be approved. Once we have completed this task, we will turn to the review provisions in the statute.

- 3. Pursuant to Section 4005(d)(1)(A) of RCRA, as amended by the WIIN Act (see p. 109 of the attached), is OLEM planning to promulgate a regulation that establishes the “form” in which states may submit evidence of a permit program or other system of prior approval and conditions for regulation by the state of CCR units, and if so, does OLEM have a ballpark guess of when they will propose such a reg.?**

The WIIN Act does not require EPA to promulgate such a regulation. Therefore, at this time, EPA is developing a guidance document in order to assist States in ensuring that their permit program applications are complete and adequate by providing a framework for the approval process. The guidance will address required components of the state permit program application, demonstration of adequacy including legal and procedural requirements, allowable state flexibilities and a checklist to ensure compliance with the requirement to be as protective as the federal part 257 regulations.

## **EPA Authorities**

- 1. Does EPA have enforcement authority now?**

Yes. the legislation is currently in effect, so EPA is authorized to use RCRA 3007 and 3008 to enforce the requirements of the CCR rule.

- 2. Will citizen suits under 3008 still be allowed if a permit program exists in the state?**

The legislation does not modify or otherwise affect citizens' ability to file suit under section 7002. See 4005(d)(7).

**3. Is enforcement in the legislation under 3007 and 3008 restricted to open dumping only?**

Yes; RCRA defines "open dumping" to mean a CCR unit that is not in compliance with the CCR regulations (or their permit, either issued by EPA or under an approved state permit program). See sections 1004, 4005(a), 4005(d)(3)-(4).

**4. Will we need to do Indian "consultation" process?**

We are working with the Tribal Team. There are three facilities subject to the CCR rule that are located in Indian Country.

**Effect of Other Federal Actions on Implementation**

**1. How will the Regulatory Freeze Pending Review impact the implementation of the CCR legislation in Public Law No. 114-322, the Water Infrastructure Improvements for the Nation's (WIIN) Act? Specifically, the provision in the CCR legislation regarding nonparticipating States that states:**

*In a nonparticipating State and subject to the availability of appropriations specifically provided in an appropriations Act to carry out a program in a nonparticipating State, the Administrator shall implement a permit program.*

**a. What is the likelihood of EPA receiving appropriations to carry out this provision?**

EPA has no information at this time.

**b. If funding is not appropriated for EPA to implement a permit program in a non-participating State, is the default that the EPA rule would continue to be self-implementing?**

Yes. The statute expressly provides that a facility must continue to comply with the part 257 federal CCR regulations until a permit issued by an approved state or EPA is in effect. Section 4005(d)(3).

**c. What is the status of the court settlement regarding the EPA CCR rule – has it been approved by the judge? Does the new law impact the court settlement? If so, how?**

The settlement was approved on June 14, 2016. The new statute does not affect the settlement in any way.

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